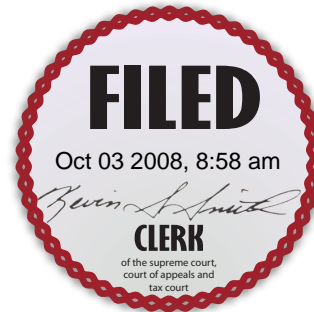


Pursuant to Ind. Appellate Rule 65(D), this Memorandum Decision shall not be regarded as precedent or cited before any court except for the purpose of establishing the defense of res judicata, collateral estoppel, or the law of the case.



ATTORNEY FOR APPELLANT:

MATTHEW JON MCGOVERN
Evansville, Indiana

ATTORNEYS FOR APPELLEE:

STEVE CARTER
Attorney General of Indiana

JOBY D. JERRELLS
Deputy Attorney General
Indianapolis, Indiana

**IN THE
COURT OF APPEALS OF INDIANA**

ELIJAH ARMES II,)	
)	
Appellant-Defendant,)	
)	
vs.)	No. 82A01-0802-CR-89
)	
STATE OF INDIANA,)	
)	
Appellee-Plaintiff.)	

APPEAL FROM THE VANDERBURGH SUPERIOR COURT
The Honorable Robert J. Pigman, Judge
Cause No. 82D02-0703-FB-223

October 3, 2008

MEMORANDUM DECISION - NOT FOR PUBLICATION

KIRSCH, Judge

Following a jury trial, Elijah Armes II (“Armes”) appeals from his convictions for

criminal confinement¹, a Class D felony, battery resulting in bodily injury², a Class A misdemeanor, and strangulation³, a Class D felony. Armes raises the following restated issues on appeal:

- I. Whether the trial court committed fundamental error by allowing the admission of firsthand witness testimony about the effects of alcohol on Armes.
- II. Whether the trial court improperly imposed consecutive sentences.

We affirm in part, reverse in part, and remand.

FACTS AND PROCEDURAL HISTORY

L.F. and Armes had been dating for a little more than three months when Armes accused L.F. of infidelity. L.F. attempted to terminate the relationship; however, Armes threatened to retaliate by publicizing nude photographs he had taken of L.F. while she slept. Ultimately, L.F. agreed to meet with Armes at a local bar.

When L.F. arrived at the bar she waited outside for Armes and engaged in a conversation with a bar employee. The employee saw Armes hiding between cars in the parking lot spying on L.F. Armes called L.F. and accused her of infidelity with the bar employee. L.F. and Armes went inside where they continued to argue, and Armes poured a beer over L.F.'s head. The bouncers working at the bar had at different times asked, first

¹ Ind. Code §35-42-3-3(a).

² Ind. Code §35-42-2-1(a)(1)(A).

³ Ind. Code §35-42-2-9(b).

L.F. and then Armes, if the other needed to be asked to leave. Eventually, Armes and L.F. left together. They entered L.F.'s vehicle, and she moved the car from a parking spot in the front of the parking lot to one in the back.

L.F. attempted to telephone her mother on a friend's cell phone, but Armes grabbed the phone and cracked it in half. Armes and L.F. both exited the car whereupon Armes began punching L.F., beating her head against the vehicle, and choking her. L.F. lost consciousness from time to time, and Armes would catch her and revive her, only to continue punching her. Approximately ten minutes after a witness placed a 9-1-1 call, Armes and L.F. left the parking lot in L.F.'s vehicle.

L.F. next remembered being in the driver's seat of the car with Armes shouting at her to drive. L.F. exited the parking lot and drove to the parking lot of another bar where she parked alongside Armes's car. Armes got out of L.F.'s vehicle, pulling L.F. out by her clothing, ripping off both of her shirts. Armes proceeded to beat L.F. again until she lost consciousness. Once awakened, L.F., who was in extreme pain, drove from that bar, pursuant to Armes's demands, to find a hamburger for Armes. L.F. pulled into an adjacent lot where Armes began strangling her. L.F.'s eyes "got real big," she went limp, and began seizing. *Tr.* at 181. When L.F. awoke, Armes made her drive around, ultimately arriving back at the bar where Armes's car was parked. Armes went inside the bar, and L.F. called the police.

The State charged Armes with criminal confinement, a Class B felony⁴; battery resulting in serious bodily injury⁵, a Class C felony; and strangulation⁶, a Class D felony. At the conclusion of the jury trial, the jury returned guilty verdicts for the lesser-included offense of criminal confinement, a Class D felony; the lesser-included offense of battery resulting in bodily injury, a Class A misdemeanor; and strangulation, a Class D felony, as charged.

The trial court sentenced Armes to an aggregate executed sentence of five years; two years executed for the criminal confinement conviction, a concurrent one-year executed sentence for the battery conviction, and three years executed to be served consecutively, for the strangulation conviction. The trial court ordered this sentence to be served consecutively to the sentence entered under another cause number.

DISCUSSION AND DECISION

I. Admission of Evidence

The admissibility of evidence is within the sound discretion of the trial court, and the decision whether to admit evidence will not be reversed absent a showing of manifest abuse of the trial court's discretion resulting in the denial of a fair trial. *Bailey v. State*, 806 N.E.2d 329, 331 (Ind. Ct. App. 2004), *trans. denied*. The improper admission of evidence is harmless error if the conviction is supported by substantial independent evidence of guilt satisfying the reviewing court that there is no substantial likelihood the challenged evidence

⁴ Ind. Code §35-42-3-3(b)(2)(B).

⁵ Ind. Code § 35-42-2-1(a)(3).

⁶ Ind. Code § 35-42-2-9(b).

contributed to the conviction. *Winbush v. State*, 776 N.E.2d 1219, 1221 (Ind. Ct. App. 2002), *trans. denied* (2003). The erroneous admission of evidence that is merely cumulative of other evidence in the record is not reversible error. *Blanchard v. State*, 802 N.E.2d 14, 30 (Ind. Ct. App. 2004).

Prior to trial, Armes's counsel filed a motion in limine in which he sought the exclusion of evidence of Armes's reputation for violence. The trial court held a hearing on Armes's motion, granting it in part, but allowing the State to introduce evidence from witnesses with firsthand knowledge of the effect of alcohol on Armes. *Appellant's App.* at 4. The trial court held that any use of alcohol by Armes on the night of the offenses was admissible, but that any other specific acts of violence committed by Armes while under the influence of alcohol may not be admitted without a further ruling from the trial court. *Id.* at 4-5. The State introduced evidence of the effect of alcohol use on Armes without objection from defense counsel.

Here on appeal, Armes acknowledges his trial counsel did not object to the admission of the evidence at trial. *Appellant's Br.* at 8. Armes argues now that the trial court committed fundamental error in allowing the admission of that evidence. Armes claims that the evidence is impermissible evidence of his character or a trait of character in violation of Indiana Evidence Rule 404(a).

An order in limine is not a final determination of the admissibility of the evidence referred to in the motion. *Smith v. State*, 506 N.E.2d 31, 35 (Ind. 1987). In order to preserve error in the overruling of a pre-trial motion in limine, the appealing party must object to the

admission of the evidence at the time it is offered. *Simmons v. State*, 760 N.E.2d 1154, 1158 (Ind. Ct. App. 2002). “Our supreme court has held that an objection must be specific in order for the issue to be preserved for appellate review.” *Id.* (citing *Willis v. State*, 510 N.E.2d 1354, 1357 (Ind. 1987)).

Failure to object at trial constitutes waiver of review unless an error is so fundamental that it denied the accused a fair trial. *Mitchell v. State*, 455 N.E.2d 1131, 1132 (Ind. 1983). Our Supreme Court has stated that the doctrine of fundamental error is only available in egregious circumstances. *See Brown v. State*, 799 N.E.2d 1064, 1067 (Ind. 2003). Fundamental error is error so prejudicial to the rights of a defendant that it amounted to a denial of fundamental due process. *Lacey v. State*, 670 N.E.2d 1299, 1302 (Ind. Ct. App. 1996). While denial of a constitutional right may demonstrate fundamental error, such conclusion does not automatically follow. *Foster v. State*, 484 N.E.2d 965, 967 (Ind. 1985). “The mere fact that error occurred and that it was prejudicial will not suffice. . . . Rather[,] the error must be one such that the defendant could not possibly have had a fair trial or such that this court is left with the conviction that the verdict or sentence is clearly wrong or of such dubious validity that justice cannot permit it to stand.” *Stewart v. State*, 567 N.E.2d 171, 174 (Ind. Ct. App. 1991), *trans. denied*.

Prior to the admission of the evidence in question, T. C., a witness to the initial beating, testified about what she saw. She described how Armes had L.F. in a chokehold and that L.F. lost consciousness repeatedly only to be revived and beaten again by Armes. *Tr.* at 35-36. Carter testified that Armes would cease beating L.F. when males walked through the

parking lot, but would continue when females walked through the parking lot. *Id.* at 38-39. Carter testified that L.F. tried to fight back, but could not. *Id.* at 43.

Ind. Evidence Rule 404(a) provides that “[e]vidence of a person’s character or a trait of character is not admissible for the purpose of proving action in conformity therewith.” The trial court specifically ruled prior to trial that “[a]ny witness who has first hand knowledge as to the effects alcohol has on the def[endan]t can testify in general terms. Specific acts of violence while under the influence of alcohol may not be admitted without further order of the court.” *Appellant’s App.* at 4.

Stan Wilson, one of Armes’s friends, testified that sometimes the change in his demeanor had been good, but that there were times when alcohol would make Armes aggressive. *Tr.* at 81. However, the questions were presented in terms of Armes’s behavior when he had been excessively drinking alcohol. Armes’s former girlfriend testified that when Armes drank alcohol to excess he could get volatile. *Id.* at 134. There was no testimony about specific acts of violence while Armes was under the influence of alcohol.

Armes argues that the testimony about his change in demeanor when using alcohol in excess negates the presumption of innocence, and that it unfairly bolstered L.F.’s testimony. Armes contends that the State’s presentation regarding the crimes leading to these felony convictions relied in large part on L.F.’s testimony. However, given T.C.’s testimony, it is unlikely that the evidence had a substantial influence on the jury’s decision. Armes has failed to establish that fundamental error occurred.

II. Consecutive Sentencing

Armes asserts that the sentence he received exceeds the statutory cap on crimes committed in the course of a single episode of criminal conduct. Armes objected at the conclusion of his sentencing hearing on that basis, yet the trial court overruled the objection because Armes was convicted of crimes of violence.

Armes is correct that none of the convictions is a crime of violence as defined by Ind. Code §35-50-1-2(a), and the State concedes as much. *See Appellee's Br.* at 11. The question then is whether the crimes committed by Armes arose from a single episode of criminal conduct. We believe that they did.

Ind. Code §35-50-1-2(b) defines an episode of criminal conduct as “offenses or a connected series of offenses that are closely related in time, place, and circumstance.” Ind. Code §35-50-1-2(c) provides that a

court may order terms of imprisonment to be served consecutively even if the sentences are not imposed at the same time. However, except for crimes of violence, the total of the consecutive terms of imprisonment. . . .to which the defendant is sentenced for felony convictions arising out of an episode of criminal conduct shall not exceed the advisory sentence for a felony which is one (1) class of felony higher than the most serious of the felonies for which the person has been convicted.

Here, Armes began choking and beating L.F. rendering her unconscious on several occasions in a bar parking lot. L.F. recovered enough in order to drive the vehicle, and drove at Armes's direction to try to find a hamburger for him. At another parking lot Armes resumed strangling and beating L.F. The offenses are temporally related, within an approximate two-hour time period, and are all related to beating and strangling L.F. Consequently, we find that the trial court erred in sentencing Armes as his crimes were part

of a single episode of criminal conduct. *See Purdy v. State*, 727 N.E.2d 1091, 1093 (Ind. Ct. App. 2002), *trans. denied* (crimes occurring in short period of time and all part of assault against ex-girlfriend were single episode of criminal conduct).

Both of the most serious felony convictions Armes received were Class D felonies. The advisory sentence for a Class C felony, one class of felony higher, is four years. Ind. Code §35-50-2-6(a). The trial court imposed a two-year sentence for the criminal confinement conviction, and a concurrent one-year sentence for the battery resulting in bodily injury conviction. Accordingly, on remand, the consecutive sentence imposed for the strangulation conviction should be reduced from three years executed to two years executed, for an aggregate sentence of four years.

Affirmed in part, reversed in part, and remanded for resentencing consistent with this opinion.

VAIDIK, J., and CRONE, J., concur.